Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.----------

IN THE
SUPREME COURT OF THE UNITED STATES

SERAFINO F. VELARDI,
Petitioner,

v.

NEW YORK CITY FIRE DEPARTMENT
PENSION FUND,
Respondents.

On Petition For Writ Of Certiorari To The
United States Second Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

SERAFINO F. VELARDI
Petitioner, pro se
315 S.E. Oakridge Drive
Port St. Lucie, Fl. 34984
Tel# 561-340-4860

4/pp

I

QUESTIONS PRESENTED

Did the United States Second Circuit Court of Appeals reverse themselves in the Velardi case, when they affirmed the District Court's decision, that the Americans With Disabilities Act is not retroactive?

This decision by the Second Circuit Court of Appeals conflicts with their earlier ruling in a similar case involving the same important matter. Where a noted exception was acknowledged in the "Howie" case, docket number 96-9008, November 21, 1997. (Note exhibit " A " for details)

Was plaintiff-appellant's constitutional guarantee of equal protection under the law violated when plaintiff was not given the right to respond to the charge of giving a false retirement date before the District Court's Memorandum Opinion was rendered?

Was plaintiff denied equal protection under the law when plaintiff's motion for summary judgment in 1995 and again in 1998 were never controverted by the defendant-appellee or even noted by the District Court?

LIST OF PARTIES

All parties for the New York City Government are represented by the Corporation Counsel of the City of New York, MICHAEL D. HESS, Law Department, 100 Church Street, New York, New York 10007. Telephone No. (212) 788-1041 or 1055.

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OPINIONS BELOW

Exhibit " B " pages App.7 through App. 13 is the District Court's Memorandum Opinion in the Velardi v. NYCFD Pension Fund, docket number 95 Civ. 4548(LAK), September 18, 1998.

In such Memorandum Opinion plaintiff is accused of giving a false retirement date. Plaintiff was not given any opportunity to answer such a serious charge. There was no mentioning of any false statement in any previous oral arguments or in any documents from the Court. Every person under the law should be given the right to defend themselves, before judgment is given.

There was no false retirement date given by plaintiff. It is incredible to conclude from the plaintiff's questionnaire in 1995, when no retirement date was asked for on such questionnaire, to conclude that the September 15, 1992 date was plaintiff's retirement date. Such date was to show the Court that plaintiff first filed a complaint with the Equal Employment Opportunity Commission (EEOC) on September 15, 1992.

The District Court accused plaintiff of not informing the Court in the early stages of litigation, as to the retirement date. The Court did not examine plaintiff's Exhibit " A " in June 1996, that was made a part of the Court record, which clearly noted the retirement date.

The Court continually accused plaintiff of having an option on retirement, when defendant's own expert stated in affidavit of August 18, 1998, where Deputy Commissioner David Clinton of the Legal Affairs Department, noted - - - - - -

> (" It is my understanding that a policy was in force in the FDPF (Fire Dept. Pension Fund) in the early- and mid-1970's that precluded a firefighter with more than twenty years of service from retiring "for service" after having filed for ADR (Accidental Disability Retirement) or ODR (Ordinary Disability Retirement) and having been found disabled by the 1-B Medical Board.")

The District Court failed to rule on plaintiff's motion for summary judgment in 1995 and also in 1998. The defendant never controverted such motions for summary judgment, which should in itself be Court accepted.

The District Court fails to accept the Second Circuit Court of Appeals acknowledgement of an exception to the ADA not being retroactive, as noted in the "Howie" case. Note Exhibit " A " App. 1 through App. 7 for details.

The United States Second Circuit Court of Appeals affirmed the District court's Memorandum Opinion on June l, 1999, docket number 98-9358; and in doing so, reversed their own earlier acknowledgement, that there was an exception to the ADA not being retroactive. Note Exhibit C, pages App. l4 through App.16 for details.

> The "Howie" case, docket number 96-9008, November 21, 1997, where the Second Circuit Court of Appeals acknowledged the exception to the ADA retroactivity.

Exhibit D, pages App. l7 and 18, clearly indicate that no appeal judge ruled on the "unresolved issue."

Exhibit E, pages App. 19 and 20, again demonstrated that no appeal judge ruled on the "unresolved issue."

JURISDICTION

The United States Supreme Court has jurisdiction of this action based upon 28 U.S.C. Section 1257(a). Petitioner seeks review of the judgment of the United States Second Circuit Court of Appeals; as due process was denied under the First and Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Plaintiff-appellant, a retired Fire Department New York Captain, seeks the "for service" retirement option and not the ordinary disability retirement.

Plaintiff-appellant had applied for an accidental (line-of-duty) disability retirement because of a hearing disability.

Defendant-appellee did not inform plaintiff at application, that there would be no line-of -duty disability with a cumulative hearing loss disability. There was no informing plaintiff that there would be no option given. There was no informing plaintiff that a considerable amount of overtime already worked would be lost by the time of filing and the retirement date, because of the disability light-duty status. There was no final twelve months of overtime credited towards final compensation.

The defendant-appellee's argument, that the ordinary (non-line-of-duty) disability retirement was far superior to the "for service" retirement, is completely incorrect; because, the overtime factor was not even considered by the defendant-appellee. And to justify their allegation, that it was therefore not necessary to inform the person with a disability, because it was a better deal. The defendant-appellee's policy was well documented by their own expert witness, Deputy Commissioner of Legal Affairs, David Clinton.

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted because, petitioner was denied the constitutional guarantee of equal portection under the law.

The District Court had rendered its decision based on the alleged false retirement date by plaintiff. Plaintiff was not even given any opp-ortunity to answer such a serious charge. The Court's decision was not based on any factual evidence, but rather on a presumed conclusion drawn from a questionnaire that plaintiff filed in the District Court in 1995. There was no retirement date asked for. The September 15, 1992 date mentioned in the plaintiff's answers; was the date that a complaint was filed with the EEOC, to indicate the on-going nature of the discrimination; and to indicate the date of the first complaint with the governing agency for the ADA Laws.

The ruling made by the Second Circuit Court of Appeals, was apparently made with the District Court's determination of the facts. There was no attempt to consider the unresolved issue of retroactivity.

CONCLUSION

Due process and petitioner's constitutional guarantee of equal protection under the law was not given, when there was no opportunity given to respond to the allegation of giving a false retirement date. Such charge was never stated prior to the District Court's Memorandum Opinion of September 18, 1998. It was only stated in the Memorandum Opinion, which decision was made without plaintiff's right to respond.

There is no equal protection when plaintiff's facts and evidence are ignored.

This Court should grant the Petition For Writ Of Certiorari when equal treatment under the law is absent.

DATED:----------

Respectfully submitted,

Serafino F. Velardi
Petitioner, Pro se
315 S.E. Oakridge Drive
Port St. Lucie, Fl. 34984
Tel# 561-340-4860

App. 1
EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER
THIS SUNMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse, Foley Square, in the City of New York, on the 21st day of Nember, one thoussand nine hundred and ninety-seven.

PRESENT: Hon. James L. Oakes, Hon. John M. Walker, Jr., Hon. Fred I. Parker,

Circuit Judges.

- -

App. 2

EDWARD J. HOWIE,

Plaintiff-Appellant,

v.

No. 96-9008

CITY OF NEW YORK, ARTICLE II, PENSION BOARD MEMBERS OF THE NEW YORK CITY POLICE DEPARTMENT, SERGEANT'S BENEVOLENT ASSOCATION OF THE CITY OF NEW YORK.

Defendants-Appellees.

- -

AL COLLURA, JR., RAYMOND J. LEWIS

Plaintiffs-Appellants,

v. Nos. 96-9744(L) 96-7947(Con)

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, ARTICLE II, PENSION BOARD MEMBERS OF THE CITY OF NEW YORK POLICE DEPARTMENT, PATROLMAN'S BENEVOLENT ASSOCIATION,

Defendants-Appellees.

- -

WAYNE VAHLDIECH,
Plaintiff-Appellant,
v. No. 96-9179

NEW YORK CITY POLICE PENSION FUND,
Defendant-Appellee.

PATRICK W. MCQUADE,
Plaintiff-Appellant,
v. No. 96-9046

NEW YORK CITY POLICE PENSION FUND,
ET AL.
Defendants-Appellees.

PATRICT WILLIAM MCQUADE,

Plaintiff-Appellant,
v. No. 96-9048

NEW YORK CITY POLICE PENSION FUND,
ET AL.

Defendants-Appellees.

APPEARING FOR PLAINTIFF- Edward J. Howie, Pre Se, APPELLANT (No. 96-9008): Port Orange, Florida

APPEARING FOR PLAINTIFFS Ronald Podolsky, APPELLANTS (Nos. 96-7944, Hauppauge, New York 96-9747, 96-9046, 96-9048):

APPEARING FOR PLAINTIFF-Wayne Vahldieck, Pro Se, APPELLANT (No. 96-9179): Massapequa, New York

APPEARING FOR DEFENDANTS- James Dwyer, Assistant APPELLEES (Nos.96-9008, Corporation Counsel of the City of 96-7944, 96-7974, 96-9179, New York, New York, New York 96-9046, 96-9048):

Appeal from the United States District Court for the Southern District of New York (Nos.96-9008, 96-7944, 96-7947, 96-9046, 96-9048) and for the Eastern District of New York (No. 96-9179).

This case came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Duffy, J.) (Nos. 96-9008, 96-7944, 96-7947, 96-9046, 96-9048) and for Eastern District of New York (Johnson, J.)(No. 96-9179), and was argued, with the exception of plaintiff-appellant Edward J. Howie, who submitted.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of both district courts be and they hereby are affirmed.

Plaintiffs-appellants Edward J. Howie ("Howie"), Al Collura, Jr.("Collura"), Raymond J. Lewis ("Lewis"), Patrict W. McQuade (W. McQuade"), and Patrict William McQuade ("William McQuade"), appeal from the July 17, 1996 judgment of the Southern District granting, pursuant to Fed. R. Civ. P. 12(b)(6), defendants-appellees' motion to dismiss appellants' complaint under the American With Disabilities Act, 42 U.S.C. & l2101 et seq. ("ADA"). Plaintiff-appellent Wayne Vahlidieck ("Vahldieck") appeals from the July 31, 1996 judgment of the Eastern District granting, pursuant to Fed. R. Civ. P. 12(b)(6), defendants-appellees motion to dismiss Vahldieck's complaint under the ADA.

Howie, a former sergeant with the New York City Police Department ("NYPD"), alleges that after over twenty years of service with the NYPD, he was "forced" in 1983 to receive a disability retirement rather than the more lucrative "for service" retirement offered to similarly situated, non-disabled twenty-year retirees. Collura alleges that, at his retirement in February 19, 1973, he received no "for service" benefits on his disability pension. Lewis alleges that, at his retirement on October 13, 1978 following a spine injury, he received no "for service"benefits on his disability pension.

W. McQuade alleges that, at his retirement as a police detective on January 12, 1982, he received no "for service" benefits on his disability pension. William McQuade alleges that, at his retirement as a police officer on October 10, 1990, he received no "for service" benefits on his disability pension. Vahldieck allages that he was forced by the NYPD to retire in August 11, 1980 as a result of a disability.

Howie, Collura, Lewis, W. McQuade, William McQuade, and Vahldieck all retired prior to July 26, 1992, the effective date of the ADA ("effective date"), and all six allege discriminatory acts by defendants-appellees (i.e. discriminatory discharge and forced retirement with disability) that also predate the effective date. Because the ADA is not retroactive, all plaintiffs-appellants' ADA claims must therefore fail. See Smith v. UPS, Inc. , 65 F.3d 266,266 (2d Cir. 1995). Plaintiffs-appellants do not allege any district discrimatory acts by defendants-appellees that post-date July 26, 1992, such as the withholding of "for service" benefits that had been offered to them pre-effective date. We do not therefore address the perhaps unresolved issue of whether the ADA time-bars claims of pension or benefit discrimination that occur post-effective date, where the plaintiffs retired pre-effective date.

We have carefully considered appellants' remaining arguments and find them to be without merit. Accordingly, we affirm the judgments of the district courts.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

SERAFINO F. VELARDI,

Plaintiff, 95 Civ. 4548(LAK)

- against -

NEW YORK CITY FIRE DEPARTMENT PENSION FUND,

Defendant.

- -

MEMORANDUM OPINION

Appearances:
Serafino F. Velardi
Plaintiff, Pro se

Susan Sanders
Anshel David
Assistant Corporation Counsel
MICHAEL D. HESS
CORPORATION COUNSEL OF THE CITY OF NEW YORK

LEWIS A. KAPLAN, District Judge.

Plaintiff claims that he was forced to retire on disability from the New York City Fire Department, that he was not then advised of is ability to retire "for service," and that he therefore was a victim of discrimination on the basis of his disability. As it now is clear that the events of which plaintiff complains occurred long before the enactment of the Americans With Disabilities Act of 1990 ("ADA"),1 the defendant's motion for summary judgment dismissing the complaint is granted.

Facts and Prior Proceedings

Plaintiff filed his pro se complaint in this action in 1995. He claims that he was discriminated against on the basis of disability in that his pension "is less than (for) service retirement pension(s)" afforded to others with 20 or more years of service. Specifically, he asserts that "(s)ervice retirees receive an additional benefit besides their regular pension, whereas, a disability retiree is denied that additional benefit even if he served 20 or more years of service before sustaining a disability."2 The complaint alleges "that the alleged discriminatory acts occurred on: September 15, 1992." 3

1 42 U.S.C. & 12101 et seq.

2 Cpt // 4, 7, 8.

3 Id / 5.

The defendant moved to dismiss the complaint. The motion was heard together with a motion in another case that raised the issue whether the defendant's making of certain payments to "for serice" retirees that were not made to disability retirees violated the ADA. While it seemed at first blush that plaintiff's claim differed from those of the plaintiffs in the other case in that he appeared to contend that he was forced to take an inferior disability pension rather than being permitted to retire "for service," plaintiff made clear at oral argument that he was not misled concerning his option to retire "for service." Rather, he claimed that he simply was ignorant of his option to retire "for service." Accordingly, this Court concluded that plaintiff's position was no different than that of the plaintiffs in the other case and dismissed both. 4

Plaintiff's in both cases appealed, and the appeals were consolidated for argument with other related cases. The Court of Appeals, among other things, upheld this Court's basic ruling that there was no ADA violation by virtue of the additional payments to "for service" retirees where similarly situated employees were free to choose whether to retire on disability or "for service." 5 It vacated the dismissal as to this plaintiff; however, on the ground that a failure to inform plaintiff of his right to retire "for service" would be sufficient an ADA claim. 6

The matter then returned to this Court, the defendant investigated the particulars of plaintiff's situation, plaintiff was deposed, and the facts turned out to be rather different from what plaintiff alleged in the complaint. Most importantly, whereas the complaint asserted that the discriminatory act complained of occurred on September 15, 1992, the truth is that plaintiff retired on ordinary disability on December 20, 1975. While defendant contends that the record shows also that plaintiff was fully aware of his right "for service" and voluntarily chose the disability option, there is no need to go into those matters.

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4 Graboski v. Guiliani, 937 F. Supp. 258 (S.D.-N.Y. 1996), aff'd in part, rev'd in part sub non. Castellano v. City of New York, 142 F. 3d 58(2d Cir.), pets. for cert. filed, 66 U.S.L.W. 3790 (May 27, 1998) (No.97-1961), 67 U.S.L.W. 3001 (June 18, 1998) (No. 97-2050).

5 Castellano, 142 F.3d at 71.

6 Id. at 72

DISCUSSION

The ADA was enacted on July 26, 1990 and became effective in 1992. It is not retroactive, and it does not apply to actions taken prior to its effective date.7 Here, plaintiff retired nearly seventeen years prior to the effective date of the statute. Even if he was "forced." by lack of adequate information concerning his retirement options, to retire on ordinary disability rather than on the allegedly more advantageous "for service" basis, the defendant's action simply was not covered by the ADA.

Plaintiff makes essentially three responses to this point. He asserts that "for the Defendant to raise such a defense when no such defense was raised before in the instant case, is completely unacceptable."8 He points to New York state authorities holding that a denial of disability benefits "is of a 'continuing nature.'" 9 And he contends that the Court of Appeals' statement on the prior appeal that a failure to inform plaintiff of his rights "would be sufficient to establish Velardi's Title l ADA claim" is conclusive.10 None has merit.

7 104 Stat. 327,337 (private employers), 338 (public entities) (1990); Smith v. United Parcel Serv. of Am., Inc. 65 F. 3d 266 (2d Cir. 1995); O'Bryant v. City of Maryland, 9 F. 3d 421, 422 (5th Cir. 1993).

8 Notice of response to defendant's dispositive motion, at 4. 9 Id. at 5-6. l0 Id. at 7.

First, there was nothing "unaccepable" in the defendant's prior failure to raise the point upon which it now relies. Plaintiff's complaint falsely stated that the alleged discriminatory act occurred on September 15, 1992. 11 When defendant discovered following the remand by the Court of Appeals that plaintiff in fact was complaining of events that had occurred seventeen years earlier, it properly exercised it rights.

Second, the continuing violations doctrine, to which plaintiff presumably refers, has no bearing here. While the commission of a discriminatory act within the limitations period, in limited circumstances, may permit an employment discrimination plaintiff to obtain relief with respect to events for which relief otherwise would be barred by the statute of limitations,12 there is not a scrap of support for the suggestion that an act lawful when committed may be rendered unlawful by the subsequent passage of legislation which proscribes such acts prospectively.

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11 Cpt. // 5.

12 See e.g., Johnson v. Nyack Hosp. 891 F. Supp. 155, 162-66 (S.D.N.Y. 1995), aff'd on other grounds, 96 F. 3d 8 (2d Cir.1996).

Finally, the Court of Appeals' statement on the prior appeal obviously must be considered in light of the facts that (a) plaintiff had alleged that the discriminatory acts complained of occurred on September 15, 1992, after the effective date of the ADA, and (b) in consequence, no issue as to the applicability of the statute to events prior to its effective date was presented. As a result of the complaint, everyone assumed that plaintiff's grievance related to events that were subject to the statute.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment dismissing the complaint is granted.

SO ORDERED.

Dated: September 18, 1998

"s/ Lewis A. Kaplan"
LEWIS A. KAPLAN
United States District Judge

EXHIBIT C
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the lst day of June one thousand nine hundred and ninety-nine.

PRESENT: HONORABLE JAMES L. OAKES,
HONORABLE FRED I. PARKER,
HONORABLE SONIA SOTOMAYOR,
CIRCUIT JUDGES.

SDNY
95-Cv- 4548 (SEAL) UNITED STATES
Kaplan COURT OF APPEALS
Katz SECOND CIRCUIT
June – 1999 Karen Greve Milton Acting Clerk

---------- x

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SERAFINO F. VELARDI,
Plaintiff-Appellant,

v. No. 98- 9358

N.Y.C. FIRE DEPARTMENT PENSION FUND,
Defendant-Appellee.

---------- x

APPEARING FOR APPELLANT: Serafino F. Velardi, pro se
Port St. Lucie, Florida

APPEARING FOR APPELLEE: Charles L. Finke, Esq., Michael D. Hess, Corporation Counsel of the City of New York
Francis F. Caputo, George Gutwirth of Counsel New York, NY

Appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, Judge).

Velardi v. NYC Fire Dept.,
No. 98-9358

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and hereby

is AFFIRMED.

Appellant sued under the Americans With Disabilities Act, 42 U.S.C. & 12101-213 (l990). After granting the appellee's motion for summary judgment, Judge Kaplan dismissed the complaint. This appeal followed.

The Americans with Disabilities Act was enacted in 1990 and became effective on July 26, 1992, Pub. L. No. 101-336 & 108, 104 Stat. 327, 337 (1990). The Act does not apply retroactively to acts taken before its effective date. See Smith v. United Parcel Service, 65 F. 3d 266 (2d Cir.1995). Velardi's retirement, the circumstances of which form the bases of this action, occurred in 1975, well before the effective date of the ADA. Therefore, the ADA does not apply to the present action.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
"s/ Lucille Carr
LUCILLE CARR
Karen Greve Milton, Acting Clerk
by: Lucille Carr, Deputy Clerk

EXHIBIT D

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of July one thousand nine hundred and ninety-nine.

Present: (SEAL)
Hon. JAMES L. OAKES, (UNITED STATES)
Hon. FRED I. PARKER, (COURT OF APPEALS)
Hon. SONIA SOTOMAYOR, (SECOND CIRCUIT)
CIRCUIT JUDGES, (KAREN GREVE)
(MILTON Acting Clerk)

Velardi,
Plaintiff-Appellant, Docket No. 98-9358
v.
N.Y.C. Fire Dept.,
Defendant-Appellee.

A petition for panel rehearing having been filed herein by Serafino F. Velardi,

Upon consideration thereof, it is ordered that said petition be and it hereby is DENIED.

FOR THE COURT
KAREN GREVE MILTON, Acting Clerk

By: "s/ Beth J. Meador,"
BETH J. MEADOR,
Administrative Attorney

EXHIBIT E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of January two thousand.

Velardi v. N.Y.C. Fire Dept.

Dkt No: 98-9358

(SEAL) UNITED STATES COURT OF APPEALS SECOND CIRCUIT JAN 26 2000
Karen Greve Milton, Acting Clerk

A petition for rehearing en banc having been filed herein by the appellant pro se Serafino F. Velardi,
Upon consideration thereof, it is
Ordered that said petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

By: "ss/ Beth J. Meador,
BETH J. MEADOR
Administrative Attorney

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MINIMUM RECYCLED CONTENT
POST-CONSUMER

(2)

No. 99-1590

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

SEFAFINO F. VELARDI,

Petitioner,

-against-

NEW YORK CITY FIRE DEPARTMENT PENSION FUND,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL D. HESS,
Corporation Counsel of the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1010, 1041

LEONARD J. KOERNER*
FRANCIS F. CAPUTO,
GEORGE GUTWIRTH,
of Counsel

April 25, 2000

* Counsel of Record

COUNTER STATEMENT OF THE QUESTION PRESENTED

When it was undisputed that plaintiff retired in 1975 and the Americans with Disabilities Act (ADA) did not become effective until 1992, did the United States Court of Appeals for the Second Circuit correctly determine that the ADA did not apply to plaintiff's claims concerning his retirement?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER STATEMENT OF THE CASE

Plaintiff is a former captain of the New York City Fire Department (FDNY) who retired on a disability pension in 1975, based on a progressive hearing loss, which was not linked to an employment incident. (Affidavit of Susan Sanders in Support of Motion For Summary Judgment, hereinafter "Sanders", Exhibits 7, 10. Plaintiff, appearing pro se, did not provide an Appendix on Appeal, so reference is made to the original documents of record.). Plaintiff seeks the addition to his pension of Variable Supplement Fund (VSF) payments.

In retiring, plaintiff had the option under the New York City retirement system laws of seeking service retirement or a disability pension. Under an accident disability pension, NYC Admin. Code § 13-366, the retiree receives a pension of at least three-quarters of the retiree's final salary. Under ordinary disability, the retiree receives a pension allowance of at least half of final salary if the retiree has at least twenty years of service, or one-fortieth of final year's salary multiplied by the number of years of service. See NYC Admin. Code §§ 13-362, 13-363. A retiree on accident disability has to be unable to perform regular job duties because of an accidental injury received in the line of duty, while a retiree on ordinary disability must be unable to perform the regular job duties because of a disability which is not shown to have been incurred in the line of duty. A retiree "for service" must have at least

twenty years of service, receiving a pension of one-half of the final salary and one-sixtieth of the total earnings received after the person's twentieth anniversary of service. NYC Admin. Code § 13-359.

VSF payments were first instituted in collective bargaining agreements; in 1968 with the Uniformed Firefighters Association, and in 1970 with the Uniformed Fire Officers Association. Chapter 877 of the Laws of New York of 1970 was the first piece of legislation codifying the rights and procedures involving VSF payments, which has been the subject of later legislation. The history of the VSF payments is detailed in the District Court opinion of a case decided with the instant case, Graboski v. Giuliani, 937 F.Supp 258, 260-262 (S.D.N.Y. 1996), affd 142 F.3d 58 (2d Cir. 1998). The VSF payments result from enhanced returns from investment of part of the Fire Department Pension Fund in equities rather than in fixed income securities.

The legislation governing VSF payments specifically provides that the only permissible retiree beneficiary of VSF payments is a retiree who receive a retirement allowance by reason of having retired "for service". NYC Admin. Code §§ 13-382 (5); 13-392 (6). Retirees on disability pensions do not receive VSF payments.

Proceedings

The complaint in this action had originally been dismissed by the District Court, 937 F.Supp. 258 (S.D.N.Y. 1996). On a prior appeal to the Second Circuit Court of Appeals, Velardi v. New York City Fire Department Pension Fund, decided with Castellano v. City of New York, Graboski v. Giuliani, Adornetti v. New York City Employees Retirement System, and Clifford v. New York

Police Pension Fund, 142 F.3d 58 (2d Cir. 1998), cert. den., (Castellano) 525 U.S. 820 (1998), (Graboski) 525 U.S. 922 (1998), the Second Circuit held that the provision of VSF payments with "for service" pensions, but not with disability pensions, did not constitute discrimination on the basis of disability in violation of the ADA, since a disabled retiree could choose a service retirement pension, which included the VSF payments, rather than a disability pension. Nothing in the ADA required that the disability pension, which was freely chosen by the members, also be supplemented with VSF benefits, citing Felde v. City of San Jose, 839 F.Supp. 708, 710 (N.D. Cal 1994), affd 66 F.3d 335 (9th Cir. 1995) (table). The Court also held that the VSF implementing legislation did not impair any prior contract right to VSF payments, or create any new contractual rights thereto. The Second Circuit also rejected an equal protection claim as well as other claims.

On that prior appeal, the Second Circuit reinstated the complaint in Velardi v. New York City Fire Department Pension Fund, supra, 142 F.3d at 72, because Velardi alleged that he was required to retire on a disability pension rather than "for service" in that he was unaware of the latter option and it was never offered to him. Accordingly, his complaint stated a valid cause of action that he was required to take a disability benefit which was less advantageous than a service retirement benefit for which he was also eligible, and his case was remanded to determine whether plaintiff was forced to forego "for service" benefits in that the FDNY failed to inform him of the "for service" retirement option.

The complaint in this action did not state the date of plaintiff's retirement. On remand, it was established that plaintiff's retirement was effective on December 20, 1975 (Sanders, Exhibit 10).

The record before the District Court on the remand indicated that plaintiff initially had applied for service retirement but revoked that application to seek a pension based on disability (Sanders, Exhibit 2). Plaintiff stated at his deposition (Sanders, Exhibit 36) that at the time he applied for retirement he was aware of the formula for calculating "for service" pensions and ordinary disability pensions (Exhibit 36, pp. 10-12). He also knew that "for service" retirees would receive VSF payments and that disability retirees would not (Id. 19-20), but he submitted an application for accidental disability retirement (Id. 28) because he was certain that he would be awarded it (Id. 30). In his opinion, his disability was service related and was caused by years of fire service (Id. 30, 31). Plaintiff was shocked that he was not found eligible for accidental disability retirement (Id. 44), based on the absence of any job incident to which the hearing loss was attributable (Id. 34-35).

Plaintiff stated that he was unaware of a former FDNY policy that once an application for disability retirement was submitted and the applicant was found to be disabled but ineligible for accident disability retirement, the applicant could not thereafter retire "for service", but was retired for ordinary disability (Exhibit 36, p. 47).[1] Plaintiff

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[1] See affidavit of David Clinton, FDNY Deputy Commissioner for Legal Affairs, par. 9, which policy was changed after a 1977 tax law change removing favorable tax treatment for ordinary retirement benefits which had previously rendered ordinary disability retirement unquestionably more favorable than "for service" retirement. The policy was changed to reflect the new possibility that "for service" retirement was more favorable

Continued...

admitted that when he retired in 1975 ordinary disability pensions received favorable tax treatment in that $5200 annually was exempt from taxation, which tax benefit was not revoked until after his retirement, with that legislative change being unanticipated at the time of his retirement. (Exhibit 36, p. 60, see also Affidavit of Albert Connolly, the Supervisor of Division Benefits for the FDNY Pension Fund). At the time of plaintiff's retirement only one VSF annual payment had been made, of $572, and the annual VSF payment did not increase until 1987 (Id. 67-68; see also, Affidavit of Sanford Smolowitz, Deputy Director of the FDNY Pension Bureau).

DECISION AND JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

By Decision dated September 18, 1998, reported at 20 F.Supp.2d 623, the District Court for the Southern District of New York (Kaplan, J.), granted defendant's motion for summary judgment. The District Court noted that prior to the remand plaintiff never indicated that the date of his retirement was December 20, 1975; and the complaint asserted that the discriminatory act complained of occurred on September 15, 1992 (20 F.Supp.2d at 625). The Decision states (20 F.Supp.2d at 625):

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than ordinary disability retirement, and the potential ordinary disability retiree was also afforded the opportunity to select "for service" retirement.

> The ADA was enacted on July 26, 1990 and became effective in 1992. It is not retroactive, and it does not apply to actions taken prior to its effective date. Here, plaintiff retired nearly seventeen years prior to the effective date of the statute. Even if he was "forced," by lack of adequate information concerning his retirement options, to retire on ordinary disability rather than on the allegedly more advantageous "for service" basis, the defendant's action simply was not covered by the ADA.

The District Court rejected plaintiff's argument that the defendant failed to timely raise the lack of applicability of the ADA, because "[p]laintiff's complaint falsely stated that the alleged discriminatory acts occurred on September 15, 1992. When defendant discovered following the remand by the Court of Appeals that plaintiff in fact was complaining of events that had occurred seventeen years earlier, it properly exercised its rights." 20 F.Supp.2d at 625-626. The District Court also noted that on the prior appeal the Second Circuit was never made aware that plaintiff retired in 1975, not in 1992, as might be inferred from the complaint.

The District Court also rejected plaintiff's contention that his 1975 retirement on disability, without VSF payments, constituted a continuing violation. "While the commission of a discriminatory act within the limitations period, in limited circumstances, may permit an employment discrimination plaintiff to obtain relief with respect to events for which relief otherwise would be barred by the statute of limitations, there is not a scrap of support for the suggestion that an act lawful when committed may be rendered unlawful by the subsequent

passage of legislation which proscribes such acts prospectively." 20 F.Supp.2d at 626.

The Decision of the District Court was effected by a Judgment entered September 29, 1998, granting summary judgment dismissing the complaint.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In a Summary Order, dated May 28, 1999, 182 F.3d 902, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court, stating:

> Appellant sued under the Americans with Disabilities Act, *42 U.S.C. §§ 12101-213* (1990). After granting the appellee's motion for summary judgment, Judge Kaplan dismissed the complaint. This appeal followed.
>
> The Americans with Disabilities Act was enacted in 1990 and became effective on July 26, 1992. Pub. L. No. 101-336 § 108, 104 Stat. 327, 337 (1990). The Act does not apply retroactively to acts taken before its effective date. See *Smith v. United Parcel Service, 65 F.3d 266 (2d Cir. 1995)*. Velardi's retirement, the circumstances of which form the basis of this action, occurred in 1975, well before the effective date of the ADA. Therefore, the ADA does not apply to the present action.

By Order dated July 23, 1999, the Court of Appeals for the Second Circuit denied plaintiff's petition for panel

rehearing, and by Order dated January 20, 2000, the same Court denied the petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

The Second Circuit Court of Appeals correctly determined that the plaintiff's retirement was not actionable under the ADA. Plaintiff retired in 1975. The ADA became effective on July 26, 1992. As held by each circuit to consider the issue, as well as by the Second Circuit in a prior decision, the ADA was not retroactive. Smith v. United Parcel Service, 65 F.3d 266 (2d Cir. 1995) citing Pub. L. No 101-336, § 108, 104 Stat. 327, 337 (1990); Martin v. Southwestern Virginia Gas Co., 135 F.3d 307, 309 (4th Cir. 1998); Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1529 (11th Cir. 1997); Gra[illegible]ling v. Village of Lombard, Illinois, 58 F.3d 295, 296-297 (7th Cir. 1995); Burfield v. Brown, Moore & Flint, 51 F.3d 583, 588 (5th Cir. 1995).

The courts below correctly rejected plaintiff's claim that his continuing receipt of an ordinary disability pension without VSF payments constitutes a continuing violation. When plaintiff retired in 1975, the ADA was not in existence and it was not effective until 1992. All actions taken in 1975 were lawful under existing law. Furthermore, a discrete employment action, even if unlawful at the time it was taken, is not a continuing violation simply because it has effects upon terms of employment for the plaintiff long after the applicable statute of limitations has expired. See United Airlines v. Evans, 431 U.S. 553, 558 (1977); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 908 (1989). The circuit courts have also repeatedly rejected claims that member pension choices or actions by pension plans, taken prior to the effective date of ERISA, are actionable under ERISA as a continuing violation. See Freeman v. Jacques

Orthopaedic and Joint Implant Medical Surgery Group, Inc., 721 F.2d 654 (9th Cir. 1983); Coward v. Colgate Palmolive Co., 686 F.2d 1230 (7th Cir. 1982), cert. den. 460 U.S. 1070 (1983); Baum v. Nolan, 853 F.2d 1071 (2d Cir. 1988), cert. den. 489 U.S. 1053 (1989); Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund, 869 F.2d 153, 156 (2d Cir. 1989), cert. den. 493 U.S. 818 (1989).

This Court has rejected retroactive relief even when a pension contribution or payment scheme was found by the Court to violate Title VII, holding that retroactive relief would contravene prior actuarial assumptions upon which the operation of the funds was based. See, City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 721-723 (1978); Arizona Governing Committee v. Norris, 463 U.S. 1073, 1093-1095 (1983). In Florida v. Long, 487 U.S. 223, 239 (1988), this Court specifically rejected the argument also made by the plaintiff herein that the payment of a retirement benefit below the amount of a claimed entitlement is a continuing violation:

> It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation. Our decision in *Bazemore v. Friday, 478 U.S. 385 (1986)*, is not to the contrary. *Bazemore* concerned the continuing payment of discriminatory wages based on employer practices prior to Title VII. In a salary case, however, each week's paycheck is compensation for work presently performed and completed by an employee. Further, the employer does not fund its payroll on an actuarial basis. By contrast, a pension plan, funded on an actuarial basis, provides benefits fixed under

> a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits. In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct, regardless of whether the liability principle was first announced by *Manhart*, *Norris*, or our decision here. We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.

For all of these reasons, the Courts below correctly ruled that plaintiff's retirement in 1975 was not actionable under the ADA, which became effective in 1992, and correctly rejected plaintiff's claim that his 1975 retirement was actionable as a continuing violation. This Court is respectfully urged to deny this petition for a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: April 25, 2000
New York, New York

Respectfully Submitted,

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